



Via E-mail

July 23, 2020

Records Access Appeal Officer
New York State Department of Health
Corning Tower, Room 2364
Albany, NY 12237-0044
foil@health.ny.gov

Re: Appeal of Constructive Denial of FOIL Request No. 20-02-126

Dear Sir or Madam:

Earthjustice, on behalf of itself and Riverkeeper, Inc., (the “Requestors”), respectfully submits this appeal of the constructive denial by the Department of Health (“DOH” or the “Department”) of Requestors’ February 7, 2020 request for records (the “Request” or the “FOIL Request”) submitted pursuant to the Freedom of Information Law (“FOIL”), *see* Public Officers Law (“POL”), Article 6 §§ 84–90, and DOH’s implementing regulations, *see* 10 N.Y.C.R.R. Part 50.¹ As of today, five months later, not a single record has been produced.

As a general rule, FOIL requires a response within 5 days and the production of responsive documents within a few weeks. *See* FOIL § 89(3)(a). As described more fully below, Requestors have been subjected to a series of bureaucratic extensions and the government’s failure to produce *any* documents responsive to the Request constitutes a constructive denial necessitating this appeal. The egregious delay is unreasonable because the straightforward Request was initially made on February 7, 2020, and narrowed five days later in order to receive documents more quickly. Yet, DOH has failed to produce any documents since that time and has repeatedly delayed the date on which it will produce documents. Most recently, DOH stated it may, at the earliest, produce documents on August 28, 2020. This is unacceptable and, in essence, a denial of the Request. As the Committee on Open Government explained in a FOIL Advisory Opinion, “there is no provision in the statute for repeated extensions.”² Indeed, FOIL was enacted “to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy.” *Alderson v. New York State Coll. of Agric. & Life Scis. at Cornell Univ.*, 4 N.Y.3d 225 (2005). DOH’s failure to provide one responsive document to Requestors in five months violates both the spirit and the letter of FOIL. *See* FOIL § 84. Moreover, as set forth

¹ *See* Letter from Alok Disa, Earthjustice, to Records Access Office, DOH (Feb. 7, 2020), attached hereto as Exhibit A.

² Comm. on Open Gov’t, FOIL AO 19372 (Feb. 5, 2016), <https://docs.dos.ny.gov/coog/ftext/F19372.pdf>.

more fully below, the Department's continued delays are particularly unreasonable under the circumstances of this Request. *See* FOIL § 89(3)(a),(4)(a).³

BACKGROUND

The Request could hardly be more straightforward. On February 7, 2020, Requestors sought “[a]ny and all public comments received by the Department”⁴ in response to DOH’s July 2019 proposal to adopt maximum contaminant levels (“MCLs”) for three toxic chemicals found in drinking water throughout New York State (the “Proposed Rule”).⁵ Presumably, all responsive records should be in a central file and thus easy to locate. Indeed, just prior to the Request, the Department released two documents summarizing public comments received in response to the Proposed Rule.⁶ DOH must have gathered and reviewed the documents responsive to the Request to summarize them.

Per the Department’s suggestion, Requestors agreed to narrow the scope of the Request so that responsive documents could be produced more easily and quickly. In a telephone conversation with the Department’s Records Access Officer (“RAO”) on February 12, 2020, Earthjustice agreed to the Department’s proposal to exclude public comments received in bulk via online action alerts.⁷ The Department’s RAO stated that the narrowed scope would shorten the processing period for the Request.

As stated in the Request, the records sought were intended to inform public comments on the Department’s revised proposed rule (the “Revised Rule”), which amended certain aspects of the Proposed Rule, including proposing to add a section allowing regulated entities to defer compliance with the MCLs.⁸ In the Requestors’ February 21, 2020 letter to DOH acknowledging the narrowed scope of the request, the Requestors sought at least a partial response in advance of the March 10, 2020 comment deadline for the Revised Rule, to which there has been no response.⁹ Requestors received no response to the initial Request or the February 21, 2020 letter before March 10. Thus, Requestors were frustrated in their efforts to

³ While Requestors acknowledge the COVID-19 crisis, DOH is not relying upon the crisis to justify its repeated delays. Even with the COVID-19 crisis descending upon our state, the Order declaring a disaster emergency was not issued until March 7, 2020, a full 14 days after the amended request agreed upon in order to expedite the production of the documents.

⁴ Ex. A at 2.

⁵ *See* 41 N.Y. Reg. 19–24 (July 24, 2019), <https://www.dos.ny.gov/info/register/2019/july24.pdf> (“2019 Proposed Rule”).

⁶ *See* DOH, Amendment of Subpart 5-1 of Title 10 NYCRR (Maximum Contaminant Levels) Notice of Revised Rulemaking (Jan. 22, 2020), https://regs.health.ny.gov/sites/default/files/proposed-regulations/Maximum%20Contaminant%20Levels%20%28MCLs%29_0.pdf (providing a Summary of Assessment of Public Comment and Assessment of Public Comment).

⁷ *See* Letter from Alok Disa, Earthjustice, to Rosemarie Hewig, Records Access Officer, DOH (Feb. 21, 2020) (“February 21, 2020 letter”), attached hereto as Exhibit B (confirming the agreement between Earthjustice and DOH to narrow the Request).

⁸ Ex. A at 1-2; *see* 42 N.Y. Reg. 13–16 (Jan. 22, 2020), <https://www.dos.ny.gov/info/register/2020/012220.pdf> (“Revised Rule”).

⁹ *See* Ex. B.

fully understand the Revised Rule and, as a result, their March 9, 2020 comments were limited.¹⁰ And now DOH is expected to take final action on the Revised Rule on July 30, 2020¹¹—almost six months after the Request was submitted—and Requesters *still* do not have these public documents they have identified as critical to their advocacy.

Despite the simplicity and narrowed scope of the Request, the Department now tells Requestors that they should not expect a response until August 28, 2020 at the earliest¹²—more than 200 days since its acknowledgment of the Request.¹³ This represents the *fourth* deadline that the Department has given itself. On February 10, 2020, the Department’s formal acknowledgment letter set an initial March 10, 2020 deadline¹⁴; subsequent letters dated March 11, 2020, April 22, 2020 and most recently, June 25, 2020, pushed back the deadline an additional 4.5 months, or 120 business days.¹⁵ Even if the Department were to comply with the current deadline, the response time would exceed the twenty business day period contemplated by FOIL by a factor of *seven*. See FOIL § 89(3)(a).

As mentioned above, the previous three deadlines lapsed without the Department furnishing a single responsive record. The Department has failed to justify this extraordinary delay. For four months and running, the Department has asked Requestors to accept its claim that it cannot meet its self-imposed deadlines because records “are currently being reviewed for applicable exemptions, legal privileges, and responsiveness.”¹⁶ Rather than elaborate on why these delays are reasonable given the circumstances of the Request, as required by FOIL (*see below*), the Department instead reuses the same boilerplate language set forth above in its March 11, April 22, and June 25 delay letters.¹⁷

ARGUMENT

As of the date of this appeal, the Revised Rule is still pending, and Requestors’ advocacy on it continues. Thus, DOH’s continued failure to produce the responsive records continues to impede Requestors’ advocacy and engagement with DOH’s rulemaking process.

¹⁰ Requestors’ February 21, 2020 Letter was motivated in part by a conference call with Department staff tasked with developing the MCLs, during which staff members explicitly invited targeted comments on the Revised Rule from the advocates, including Requestors.

¹¹ See DOH, *Public Health and Health Planning Council*, https://www.health.ny.gov/facilities/public_health_and_health_planning_council/ (rev. July 2020) (noting that the Public Health and Health Planning Council will “consider for adoption” the MCL proposal during its upcoming meeting scheduled for July 30).

¹² See Letter from Rosemarie Hewig, Records Access Officer, DOH, to Alok Disa, Earthjustice (June 25, 2020), attached hereto as Exhibit C.

¹³ The Request was acknowledged by letter dated February 10, 2020. Letter from Rosemarie Hewig, Records Access Officer, DOH, to Alok Disa, Earthjustice (Feb. 10, 2020), attached hereto as Exhibit D.

¹⁴ Ex. D.

¹⁵ Ex. C; Letter from Rosemarie Hewig, Records Access Officer, DOH, to Alok Disa, Earthjustice (Apr. 22, 2020), attached hereto as Exhibit E; Letter from Rosemarie Hewig, Records Access Officer, DOH, to Alok Disa, Earthjustice (Mar. 11, 2020), attached hereto as Exhibit F; Ex. D.

¹⁶ See Ex. B; Ex. C; Ex. F.

¹⁷ *Id.*

The Department's contention that it will need at least 6.5 months following receipt to provide copies of public comments submitted in response to a high-profile rulemaking—which are presumably in one file, and which the Department has already summarized in a regulatory documents—strains credulity and violates FOIL. Section 89(3) of FOIL states:

Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, *which shall be reasonable under the circumstances of the request*, when such request will be granted or denied

FOIL § 89(3)(a) (emphasis added).

If an agency makes a determination to grant a request, FOIL contemplates that records be furnished within twenty business days. *Id.* Agencies' authority to extend this twenty-business-day window is circumscribed by language that was added to section 89(3)(a) in 2005. The amended language provides:

... [I]f an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain *within a reasonable period, depending on the circumstances*, when the request will be granted in whole or in part.

Id. (emphasis added). Indeed, “[i]f access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of request, the request may be construed as a denial of access that may be appealed.” per the procedures set forth in FOIL. *See id.* § 89(4)(a); *see also* 10 N.Y.C.R.R. § 50-1.9(a).

The Committee on Open Government (the “Committee”), the state entity responsible for overseeing FOIL and issuing advisory opinions, confirms that an agency's discretion in granting itself extensions is limited. The Committee states that the 2005 amendments to FOIL “clearly are intended to prohibit agencies from unnecessarily delaying disclosure.”¹⁸ Courts have found that the twenty-day response period contemplated in FOIL is presumed to be the “appropriate time period for compliance,” with extensions allowable only for “the extraordinary case.” *Jennings v. New York City Police Dep't*, Case No. No. 402807/97, 1998 WL 35427632 (Sup. Ct., N.Y. County 1998). Indeed, in certain circumstances, the Committee has concluded that even the twenty-business day period contemplated under FOIL may not be reasonable.¹⁹

¹⁸ *E.g.*, Comm. on Open Gov't, FOIL-AO-19034 (May 6, 2013), <https://docs.dos.ny.gov/coog/ftext/f19034.html>.

¹⁹ *See id.* (The amendments are “not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access unless it is reasonable to do so based upon the circumstances of the request.”)

Thus, an agency is obliged to set and meet a deadline for responding to a FOIL request that is “reasonable” based on the circumstances, which, lacking extraordinary circumstances, should be no longer than 20 days after the acknowledgment of the request. Whether a period is reasonable depends on several factors and requires a case-by-case determination. *See, e.g., Matter of Linz v. Police Dep’t of the City of New York* at 1 (Sup. Ct., N.Y. County Dec. 17, 2001), <https://www.dos.ny.gov/coog/pdfs/casestudies/linz.pdf>. Some of the factors an agency must consider include: “the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure.” *Id.* In instances where “records are clearly available to the public under [FOIL], or if they are readily retrievable, there may be no basis for a delay of disclosure.”²⁰

Here, DOH has failed to meet the FOIL standard for production and thus has constructively denied access to records. *See* FOIL § 89(4); 10 NYCRR § 50-1.9(a). First, despite the specific and plain statutory requirements set forth in FOIL, Requestors have not received from DOH a statement setting forth “the reason for the inability to grant the request.” FOIL § 89(3)(a). The Department’s only justification for its series of delays—that “the records potentially responsive to [the Request] are currently being reviewed for applicable exemptions, legal privileges and responsiveness”—does not constitute a statement explaining the reason for DOH’s inability to meet its deadlines.²¹ In fact, this explanation does not withstand even the most basic scrutiny.

Addressing DOH’s last reason first, there is no basis whatsoever for the Department’s repeated claim that it is “unable” to respond due to review for responsiveness. The records sought—public comments filed in response to one Department rulemaking—have already been summarized and are almost certainly compiled in one location. It is unclear what type of review would be required to determine responsiveness as it relates to the Request: all comments received by the Department are responsive, and any other document in the Department’s possession is non-responsive. Any time needed to locate and retrieve these records should be trivial; the notion that DOH would need to delay its response for more than 5 months because of a review for responsiveness is absurd.

The Department’s other reasons for its inability to respond—review for exemptions and legal privileges—do not fare much better. Common sense holds that the records sought—i.e., *public* comments—are, by their very nature and definition, public records subject to disclosure. As the Committee on Open Government has explained, “when it is known that opinions or positions are being offered during a public comment period, those records are intended to be public and accessible to the public on request.”²² Thus, no exemptions from disclosure are applicable here. To the extent that an entity has requested that DOH shield all or part of its public comment from disclosure under section 89(5) or any other provision of state law, those

²⁰ *Id.*

²¹ The Committee on Open Government notes that, for purposes of section 89(3), ongoing or predictable factors such as staffing do not reflect a circumstance that “prevent[s]” disclosure nor does they constitute an agency’s “inability” to respond to a request. *See* . Comm. on Open Gov’t, FOIL-AO-19671 (June 13, 2018), <https://docs.dos.ny.gov/coog/ftext/f19671.htm>.

²² Comm. on Open Gov’t, FOIL-AO-16988 (Feb. 8, 2008), <https://docs.dos.ny.gov/coog/ftext/f16988.html>.

records should be easily separable and should in no way limit or delay the Department's response by six months. All other comments should already have been produced to Requestors.

The determination of what constitutes a "reasonable period" is dependent on the circumstances of each request. DOH has relied on the same cursory language in each of its three letters extending its response deadline, suggesting that little to no progress has been made on the Request without any additional explanation. This is wholly unreasonable. In determining a reasonable period for responding to a request, DOH must consider the volume of records requested, the burden in locating records, and the complexity of legal review. *See Linz*. First, the volume has been significantly narrowed at the request of DOH. Requestors' understood that the agreement to narrow the Request would substantially reduce the volume of records being sought and would thereby serve to significantly expedite the review process. Second, there should be no burden in locating the records. Requestors are not seeking information that needs to be compiled or gathered by the state. Finally, the complexity of the legal review cannot reasonably extend to comments that were submitted without the commenter requesting that they remain private. Again, Requestors seek public comments. As discussed above, the circumstances of the Request are such that records should be trivial to locate and retrieve and subject to limited if any legal review. There is no credible reason why not even a single responsive record can be located, reviewed, and produced between February 7 and August 28, nor has DOH even attempted to offer one.

An agency's unreasonable delay in providing responsive records constitutes a constructive denial of a FOIL request. *See* FOIL § 89(3)(a); *Murray v. Matusiak*, 247 A.D.2d 303 (1st Dept. 1998); *Empire Ctr. for Pub. Policy, Inc. v. New York City Office of Payroll Admin.*, 54 Misc. 3d 121 l(A) (Sup. Ct. N.Y. County 2017). For the reasons stated above, the Department's proposed 6.5-month delay in responding is not "reasonable under the circumstances" and thus violates FOIL. As such, based on the Department's June 25, 2020 letter delaying the Request for the third time, the Request was constructively denied, and we hereby appeal the denial.

Finally, Requestors reserve their right to seek attorney's fees and other costs incurred regarding the FOIL Request. FOIL allows courts to assess attorney's fees and other costs of litigation against an agency when that agency "fail[s] to respond to a request . . . within the statutory time." FOIL § 89(4)(c)(i). This provision was added as a basis for recovering fees to deter the overt flouting of statutory deadlines such as in the present instance. *See Matter of New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011) (explaining that the NY Legislature added the provision to "create a clear deterrent to unreasonable delays . . . and thereby encourage [government agencies] to make a good faith effort to comply with" FOIL) (internal marks and citation omitted).

CONCLUSION

As required by FOIL and Department regulations, please respond within ten (10) business days of receipt of this appeal and provide access to the records sought or a full explanation of the reasons for further denial. *See* FOIL § 89(4)(a); 10 NYCRR § 50-1.9(c). As you are aware, FOIL § 89(4) states that a failure to determine an appeal within ten business days

of the receipt constitutes a denial of the appeal, which may be immediately challenged pursuant to Article 78 of the Civil Practice Law and Rules. Requestors reserve all of their rights in this respect.

In accordance with FOIL § 89(4)(a), please ensure that copies of our appeal and the determinations that follow are sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York, 12231.

Respectfully submitted,

EARTHJUSTICE



By: Suzanne Novak

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New York, NY 10005
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*On behalf of Earthjustice and Riverkeeper,
Inc.*

Exhibit A



Via Open FOIL NY

February 7, 2020

Records Access Office
New York State Department of Health
Corning Tower, Room 2364
Albany, NY 12237-0044
foil@health.ny.gov

Re: Request for Records: Comments Received in Response to New York State Department of Health's Proposed Regulation Setting Maximum Contaminant Levels for Perfluorooctanoic Acid ("PFOA"), Perfluorooctanesulfonic Acid ("PFOS"), and 1,4-Dioxane, I.D. No. HLT-30-19-00006-P

Dear Records Access Officer:

On behalf of itself and Riverkeeper, Inc. (collectively, "Requestors"), Earthjustice respectfully submits this records request pursuant to New York State's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 ("FOIL") and the implementing regulations of the New York State Department of Health ("DOH" or "Department"), 10 N.Y.C.R.R. Part 50.

BACKGROUND

This request concerns records received by the Department in response to its July 24, 2019 proposed rulemaking setting specific maximum contaminant levels ("MCLs") for three chemicals: perfluorooctanoic acid ("PFOA"), perfluorooctanesulfonic acid ("PFOS"), and 1,4-dioxane ("2019 Proposed Rule").¹ The Department collected comments on the proposal until September 23, 2019.² On January 22, 2020, DOH published a Notice of Revised Rulemaking ("Revised Rule"), which amended certain aspects of the 2019 Proposed Rule and added a new subdivision allowing for "deferrals" from the MCLs.³ Among the regulatory documents accompanying the Revised Rule are a Summary of Assessment of Public Comment, which indicates that DOH "received over 5,000 comments" on the 2019 Proposed Rule and a Summary of Public Comment, which describes actions DOH has taken to modify the 2019 Proposed Rule in response to some of those comments.⁴

¹ See DOH, Proposed Regulation: Amendment of Subpart 5-1 of Title 10 NYCRR (Maximum Contaminant Levels (MCLs)) (July 24, 2019), <https://regs.health.ny.gov/sites/default/files/proposed-regulations/Maximum%20Contaminant%20Levels%20%28MCLs%29.pdf> ("2019 Proposed Rulemaking Package").

² See 41 N.Y. Reg. 19–24 (July 24, 2019), <https://www.dos.ny.gov/info/register/2019/july24.pdf>.

³ See 42 N.Y. Reg. 13–16 (Jan. 22, 2020), <https://www.dos.ny.gov/info/register/2020/012220.pdf>.

⁴ DOH, Amendment of Subpart 5-1 of Title 10 NYCRR (Maximum Contaminant Levels (MCLs)): Notice of Revised Rulemaking at 51–72 (Jan. 22, 2020), https://regs.health.ny.gov/sites/default/files/proposed-regulations/Maximum%20Contaminant%20Levels%20%28MCLs%29_0.pdf ("Revised Rulemaking Package").

The public comments submitted to DOH in response to the 2019 Proposed Rule are of vital importance to members of the public to better understand, and therefore make more informed comments on, DOH's Revised Rule. DOH acknowledges in its Assessment of Public Comment that it has "amend[ed] the proposed regulations" by adding a "deferral" system in response to public comments that urged the Department to extend the compliance period for exceedances of the MCLs for the newly regulated chemicals.⁵ It is critical that all public comments received by DOH about the 2019 Proposed Rule be produced promptly, so that the general public can review and evaluate the merits of the comments that prompted DOH to propose a mechanism to delay compliance with the proposed regulations for PFOA, PFOS, and 1,4-dioxane in drinking water.

RECORDS REQUESTED

Specifically, we request copies of the following records⁶ in the possession, custody or control of the Department:

- 1) Any and all public comments received by the Department in response to the 2019 Proposed Rule, the July 24, 2019 Notice of Proposed Rulemaking concerning MCLs for PFOA, PFOS, and 1,4-dioxane.⁷

We respectfully request that the Department provide electronic copies of the requested records in lieu of providing hard copies to the extent that electronic copies of the requested records are available. We also request that DEC provide records on a rolling basis as they become available for release.

DENIAL OF ACCESS

This request seeks copies of public comments filed in response to a proposed rulemaking, inherently public records. See FOIL § 86(4) (defining "record"); 10 NYCRR § 50-1.2(e). FOIL is based on a presumption of access, meaning that all agency records are presumed to be available to the public unless they fall squarely within one of the statutory exemptions. See FOIL § 87(2) (stating that an agency must "make available . . . all records" except those portions that fall within one of the exemptions); *id.* 89(4)(b) (agency has "burden of proving" that an exemption applies); *Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 79–80 (1984). The records sought here are not covered under any of FOIL's statutory exemptions. See FOIL § 87(2) (setting forth exemptions); *id.* § 50-1.6. We therefore expect the Department to furnish the records in full, without any redactions. If, however, this FOIL request is denied, either in whole or in part, please include a detailed explanation for the denial in your response. And if your office determines that access to any

⁵ Revised Rulemaking Package at 53.

⁶ Please note that the term "records," as used throughout this letter, incorporates the definition set forth in FOIL § 86(4), and is intended to include hard copy records and electronic records (such as emails and other electronically-stored files such as word processing files and PDFs).

⁷ See 41 N.Y. Reg. at 19–24.

portions of the requested records should be denied based on the statutory exemptions laid out in FOIL and DOH's implementing regulations, we request that, in accordance with FOIL, we be provided with the remaining non-exempt portions. We reserve the right to appeal and/or to judicially challenge any determination by the Department to withhold any requested records, or any portions thereof.

As you are aware, Department regulations require that DOH respond to this request within five (5) business days by either granting or denying access to the records, or, in the alternative, providing a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. *See* N.Y. Pub. Off. Law § 89(3)(a); 10 N.Y.C.R.R. § 50.17(b). We expect the Department to be able to provide documents within five business days given that the request seeks a "reasonably described" set of records that: are clearly available for release without modification; do not need to be otherwise compiled or assembled; do not need to be reviewed for withholding; and, that are available electronically and should be readily formatted for release.

CONCLUSION

Please note that Earthjustice is seeking these records as a 501(c)(3) not-for-profit corporation on behalf of itself and Riverkeeper, Inc., which is also a not-for-profit corporation. The requested records will be used in the public interest. Therefore, we respectfully request the waiver of any fees associated with this request. If fees will not be waived, please provide notice, prior to copying, of the fees that DOH will assess for producing the records requested above.

I can be reached by email at adisa@earthjustice.org, or by telephone at 212.845.7386, to answer any questions that may arise regarding this FOIL request.

We sincerely appreciate your assistance with this matter.

Respectfully yours,



Alok Disa
Earthjustice
T: (212) 845-7386
E: adisa@earthjustice.org

Exhibit B



Via E-Mail

February 21, 2020

Rosemary Hewig
Records Access Officer
New York State Department of Health
Empire State Plaza
Corning Tower
Albany, NY 12237
(518) 474-8734

Re: FOIL No. 20-02-126

Dear Records Access Officer,

On February 7, 2020, Earthjustice submitted the above-referenced request (the “Request”) pursuant to the Freedom of Information Law (“FOIL”) regarding public comments received by the New York State Department of Health (“DOH” or the “Department”) in response to its July 2019 proposed rulemaking setting maximum contaminant levels (“MCLs”) for three emerging contaminants. As stated in the Request, we seek these records to aid in the development of public comments on DOH’s revised rulemaking regarding the proposed MCLs, which ends March 10, 2020.

As you are aware, FOIL contemplates that records can be produced within five business days. See FOIL § 89(3)(a). By letter dated Monday, February 10, 2020, however, DOH stated that it would take “approximately 20 business days” to make “[a] determination as to whether [the] request is granted or denied,” without any further explanation for the extended time period.¹ The Letter further stipulated that DOH would notify Requestors “if the responsible program area(s) should require additional time to locate, assemble, and review documents that may be responsive.” Two days later, on Wednesday, February 12, 2020, DOH’s Records Access Officer contacted me via telephone to clarify the scope of the request to ask if we would agree to narrow the Request. This letter confirms the conversation with DOH’s Records Access Officer whereby Earthjustice agreed to narrow the scope of the Request to exclude comments that were submitted in bulk via online action alerts.

It was stated on that phone call that this would help to expedite processing of the request, but DOH’s Records Access Officer was not able to provide a more exact date by which records would be produced.

¹ Letter from Rosemarie Hewig, Records Access Officer, DOH, to Alok Disa, Earthjustice (Feb. 10, 2020) (“Acknowledgement Letter”).

By this letter, Earthjustice asks that records be provided no later than February 28, 2020. Twenty business days—the amount of time DOH originally said it would take to produce responsive records—would result in a production date of March 10, 2020, the same date that comments are due on the revised MCL rulemaking. Such a date would not allow the responsive records to inform public comments, defeating the very purpose of the Request.

A revised deadline of February 28, 2020 will afford the Department almost three working weeks to fully respond to the Request, which is reasonable given its narrow scope. An agency can only give itself additional time to the extent that the new deadline is “reasonable under the circumstances of the request.” FOIL § 89(3)(a). The above-referenced request is inherently narrow, as it is limited to public comments submitted on one recent rulemaking. DOH has recently published a Response to Comments, so it is expected that all responsive records should already be in one central location, drastically reducing the time needed for DOH’s FOIL staff to locate and assemble the records compared to other, more complex requests. Moreover, after the 20 business day timeframe was set forth, Requestors agreed to further narrow the Request. During the February 12 call, DOH’s Records Access Officer suggested that the narrowing of the scope of the Request would help expedite its processing. Finally, as stated in the Request, the records sought are public records squarely outside of any FOIL exemptions and should not be subject to lengthy legal review. Thus, it is reasonable that the requested records can and should be produced by February 28, 2020.

DOH staff has stated that the Department will value targeted comments from the public as it contemplates further revisions to the MCLs to ensure that this action adequately protects public health. To be able to serve the Department in its mission to protect public health, Requestors should be granted access to responsive records in advance of the comment deadline. A deadline of February 28, 2020 will give Requestors adequate time to review responsive records and incorporate them into comments we anticipate submitting on the revised MCL while also giving the Department plenty of time to locate, assemble, and review responsive records.

However, if DOH determines that it cannot make all records available by February 28, 2020, we hereby ask that the Department release records on a rolling basis as soon as FOIL staff determine that they are responsive and available for disclosure.

I appreciate your attention to this matter. Do not hesitate to contact me at the information below to discuss this letter or any other aspect of the Request.

Sincerely,

Alok Disa
Senior Research and Policy Analyst
Earthjustice, Northeast Office
T: (212) 845-7386
E: adis@earthjustice.org

Exhibit C



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

June 25, 2020

Alok Disa
EarthJustice
48 Wall Street, 15th Floor
New York, NY 10005

FOIL #: 20-02-126

Dear Mr. Disa:

This letter is regarding your Freedom of Information Law (FOIL) request of February 7, 2020, which is currently being processed.

Please be advised this Office is unable to respond to your request by the date previously given to you because the records potentially responsive to your request are currently being reviewed for applicable exemptions, legal privileges and responsiveness.

We estimate that this Office will complete its process by August 28, 2020. The Department will notify you in writing when/if the responsive materials are available for release or if the time needed to complete your request extends beyond the above date.

Should you require additional information or wish to discuss this matter further, please do not hesitate to contact me at (518) 474-8734.

Sincerely,

Rosemarie Hewig, Esq.
Records Access Officer

RH/ysd

Exhibit D



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

February 10, 2020

Alok Disa
EarthJustice
48 Wall Street, 15th Floor
New York, NY 10005

FOIL # 20-02-126

Dear Mr. Disa:

This will acknowledge receipt of your request for records under the Freedom of Information Law, received by this office on February 7, 2020.

Your request has been forwarded to the appropriate Department program area(s) to identify documents that are responsive to your request and which may be made available pursuant to all applicable provisions of the Freedom of Information Law.

A determination as to whether your request is granted or denied will be reached in approximately 20 business days or we will notify you in writing if the responsible program area(s) should require additional time to locate, assemble, and review documents that may be responsive to your request.

Please note that, pursuant to Article 6 of the Public Officers Law, a charge may be applied to your request, including the actual cost of the medium used to respond to your Freedom of Information Law request and/or other related costs. When responsive records have been identified, you will be informed of any cost and how payment should be made.

Sincerely,



Rosemarie Hewig, Esq.
Records Access Officer

RH/sjp

Exhibit E

From: [doh.sm.BOB-FOIL](#)
To: [Alok Disa](#)
Subject: FOIL #20-02-126
Date: Wednesday, April 22, 2020 7:06:22 AM

Alok Disa
EarthJustice
48 Wall Street, 15th Floor
New York, NY 10005

FOIL #: 20-02-126

Dear Mr. Disa:

This letter is regarding your Freedom of Information Law (FOIL) request of February 7, 2020, which is currently being processed.

Please be advised this Office is unable to respond to your request by the date previously given to you because the records potentially responsive to your request are currently being reviewed for applicable exemptions, legal privileges and responsiveness.

We estimate that this Office will complete its process by June 25, 2020. The Department will notify you in writing when or if the responsive materials are available for release or if the time needed to complete your request extends beyond the above date.

Should you require additional information or wish to discuss this matter further, please do not hesitate to contact me at (518) 474-8734.

Rosemarie Hewig, Esq.
Associate Counsel / Records Access Officer
NYS Department of Health
Division of Legal Affairs
Corning Tower, Room 2354
Albany NY 12237-0026
Phone: 518-474-8734



Exhibit F



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

March 11, 2020

Alok Disa
EarthJustice
48 Wall Street, 15th Floor
New York, NY 10005

FOIL #: 20-02-126

Dear Mr. Disa:

This letter is regarding your Freedom of Information Law (FOIL) request of February 7, 2020, which is currently being processed.

Please be advised this Office is unable to respond to your request by the date previously given to you because the records potentially responsive to your request are currently being reviewed for applicable exemptions, legal privileges and responsiveness.

We estimate that this Office will complete its process by April 22, 2020. The Department will notify you in writing when/if the responsive materials are available for release or if the time needed to complete your request extends beyond the above date.

Should you require additional information or wish to discuss this matter further, please do not hesitate to contact me at (518) 474-8734.

Sincerely,

Rosemarie Hewig, Esq.
Records Access Officer

RH/ysd